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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 358

J. E. AUDET and GLADYS E. AUDET, et al., *Petitioners,* vs. UNITED STATES, *Respondent.*	Court of Claims No. 476-61
FLOYD ARDELL ADAMS and ZELDA ADAMS, et al., *Petitioners,* vs. UNITED STATES, *Respondent.*	Court of Claims No. 442-61

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Claims

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PETITION FOR WRIT OF CERTIORARI
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In accordance with Rule 23 of the Supreme Court Rules this Petition respectfully shows:

(a) The order of the Court of Claims dismissing the Petition of your Petitioners was in both cases entered as follows:

"Order

"These cases come before the court on defendant's motion to dismiss plaintiffs' petitions. Upon consideration thereof, together with the opposition thereto, the oral argument of counsel, and the briefs of the parties, and on the bas ; of 28 U.S.C. sec. 1500,

IT IS ORDERED that defendant's motion to dismiss plaintiffs' petitions be and the same are granted, and plaintiffs' petitions are dismissed.

By the Court,

May 25, 1962

Marvin Jones,
Chief Judge."

(b) The grounds on which jurisdiction of this court is invoked is:

(i) The order of dismissal was entered on May 25, 1962.

(ii) No rehearing has been sought and no order requesting an extension of time within which to petition for certiorari.

(iii) The Supreme Court has jurisdiction to review the Order of Dismissal by the Court of Claims by virtue of 28 USC 1255.

(c) Petitioners filed in the United States Court of Claims, in actions number 476-61 and 442-61, claims on behalf of one hundred and sixty-four persons for damages aggregating approximately $13,000,000 when levees on the Feather River in California collapsed in December of 1955. The Petitions alleged that the collapse and break of the levees was proximately caused by the plan, design, construction, maintenance, or

operation of the flood control project by the United States of America. The theory of the Petition, in inverse condemnation, was that the collapse of the levees was caused by the inherent nature of this particular flood control project in that the project had no spillway or relief channel for use when water in excess of its capacity flowed into the narrow channel between the two levees. Water in excess of the capacity of the levees was funnelled into the channel making the collapse of a levee inevitable.

The Court of Claims dismissed the Petitions herein on the authority of 28 USC 1500 on the ground that claims under the Federal Tort Claims Act, based on negligence, are pending in the United States District Court for the Northern District of California. The lawsuits pending in California arise out of the same flood.

As the claims in these cases exceed $10,000 they are required, under 28 USC 1346 (a) to be filed in the Court of Claims with respect to inverse condemnation, whereas if these claims were for less than $10,000 the inverse condemnation rights could be litigated in the District Court at the same time as the actions under the Federal Tort Claims Act would be litigated. As inverse condemnation is a constitutional right under the Fifth Amendment to the Constitution of the United States the ruling of the Court of Claims deprives these Petitioners of *any forum* in which to litigate their constitutional rights.

The question thus presented for review by the Supreme Court is whether the Court of Claims can deny

Petitioners the right to litigate their constitutional rights in inverse condemnation.

(d) The Constitutional provisions and the statutes involved are:

Amendment V to the Constitution of the United States

". . . nor shall private property be taken for public use, without just compensation."

28 *USC* 1346

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon the Constitution . . ."

28 *USC* 1500

"The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

(e) Please see *(c)* above.

(f) Not applicable.

(g) The basis for federal jurisdiction in the Court of Claims in the first instance is Amendment V of the Constitution of the United States and the "Tucker Act." (28 USC 1491).

ARGUMENT

1. PRELIMINARY

The Petitioners filed with the United States Court of Claims approximately $13,000,000 in claims on behalf of 164 persons whose real and personal property was destroyed or damaged when levees on the Feather River in California collapsed in December of 1955. These levees were a part of the Sacramento River Flood Control Project which was planned, designed, constructed, maintained and operated by the United States Government.

The claims were filed for damages for inverse condemnation on the theory that the collapse of the levees was proximately caused by the inherent nature of the project itself.

As the Rules of the Court of Claims, Rule 12(b) provides that the Petition to the Court of Claims must state any action taken in any other judicial proceeding in the matter, Petitioners stated in their Petition, paragraph VI of the following:

> Actions are pending in the United States District Court for the Northern District of California, Northern Division (Sacramento, California), which are actions against the United States of America on behalf of each petitioner herein for the same damage herein and arising out of the same facts as form the basis of the within Petition, the sole difference being that the actions there pending are claims based on negligence, absolute liability and nuisance whereas this Petition is in inverse condemnation.

The United States moved to dismiss the Petitions on the ground that such a claim was prohibited by the provisions of 28 USC 1500 which reads:

> *Pendency of Claims in other Courts*
> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

The Court of Claims upheld the position of the United States, and dismissed the Petitions "on the basis of 28 USC 1500."

That a cause of action may exist both in negligence and in inverse condemnation from one set of factual circumstances is well established by the two cases of *Coates v. United States* where a negligence cause of action was recognized to exist in 182 F. 2nd 816 but recovery was denied because of the alleged application of the discretionary function exception, and in 117 Ct. Cl. 795 and 124 Ct. Cl. 806 where the same plaintiff with respect to the same flood damage was recognized to have a cause of action in inverse condemnation. The claim was denied for failure of proof, and not because such a claim does not exist.

2. MEANING OF "CLAIM" IN 28 USC 1500

The Congressional History of Section 1500 reveals that the section was originally enacted in 1868 because many persons having cotton claims against the Federal Government had sued the Secretary of the Treasury and other government agents in the Federal District Courts and also had sued the United States in the Court of Claims for the same causes of action. The section here under consideration was enacted for the purpose of preventing two suits in different Courts on the same cause of action, and to compel the claimant to elect in which forum he will prosecute his cause of action so that the government will not have to defend the same cause of action twice, as occurred in the instance of the cotton claims.

That this analysis of the purpose of Section 1500 is correct is clear from a reading of the Congressional Globe, 48th Congress, Second Session, 1868, page 2769.

The word "claim" in a statute generally means "cause of action." In *Atkins, Kroll Ltd. v. Carberra* (1960) 277 Fed 2nd 922 the Court ruled that the word "claim" in Rule 54 (b) means "cause of action." In *Harvey Aluminum v. American Cyanamid Co.* (1953) 263 F 2nd 105 the Court held that under Rule 41 (a) of the Federal Rules of Civil Procedure the word "claim" refers to what has traditionally been termed "cause of action." In *School District v. Lundgren* (1951) 259 F 2nd 101 the Court ruled that the word "claim" in the Federal Rules concerning appealable judgments means "cause of action", and the same conclusion was reached in *Smith v. Bene-*

dict (1960) 279 F 2nd 211. That this general rule applied to Section 1500 is confirmed by the fact that the section itself uses the term "cause of action."

The cases at bar are claims or causes of action based on the Constitutional right of inverse condemnation and, as they exceed $10,000 in amount, can only be brought in the Court of Claims. The claims or causes of action pending in the United States District Court for the Northern District of California, Northern Division are causes of action in tort under the Federal Tort Claims Act and cannot be brought in the Court of Claims.

The two cases cited by the Attorney General in his Motion to Dismiss in the Court below both involve situations in which not only were the identical causes of action being pursued in the District Court and the Court of Claims at the same time, but in both cases (*Corona Coal Co. v. U. S.*, 263 US 537, and *Wessel Duval & Company v. U. S.*, 129 Ct. Cl. 464) the causes of action were maintainable in the District Courts.

In the cases at bar the claims or causes of action in inverse condemnation were not maintainable in the District Court and the tort claims under the Federal Tort Claims Act were not maintainable in the Court of Claims (28 USCA 1491).

We respectfully submit that Section 1500 was not intended to apply to a situation where different causes of action are pending in the District Court and the Court of Claims, especially where the claim before the Court of Claims is based on a constitutional right.

We submit that Section 1500 was not intended to compel a person to waive one cause of action in order to pursue a constitutional right.

We submit that Section 1500 was intended to apply only in situations where, for the same cause of action, a party had a right to elect between two Courts, and was not intended to apply, as here, where the Petitioners had no right to elect between two Courts.

We therefore respectfully submit that a fair interpretation of 28 USC 1500 would permit the maintenance of these claims before the Court of Claims.

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3. THE INTERPRETATION OF 28 USC 1500 BY THE COURT OF CLAIMS UNCONSTITUTIONALLY DISCRIMINATED AGAINST PERSONS WHO SUFFER DAMAGE IN EXCESS OF $10,000

The interpretation of 28 USC 1500 urged by the Government unconstitutionally discriminates against persons who suffer damage in excess of $10,000 as persons whose damage is less than $10,000 may bring a cause of action in negligence under the Federal Tort Claims Act and a cause of action in inverse condemnation under the Federal Constitution, but persons whose damage is greater than $10,000 must forego one of these causes of action.

This result obtains because under 28 USC 1346 (a) inverse condemnation causes of action for less than $10,000 may be brought in the Federal District Court, whereas inverse condemnation causes of action for more than $10,000 must be brought in the Court of Claims.

Legislation cannot discriminate between great and small where size is not an index to an evil. *Engel v. O'Malley* (1910) 219 US 128.

Grossly unfair discrimination is subject to challenge under the due process clause of the Fifth Amendment to the United States Constitution. *Stewart Machine Co. v. Davis* (1936) 301 US 548 at 585; *Currin v. Wallace* (1938) 306 US 1 at 14; *Bolling v. Sharpe* (1953) 347 US 497 at 499.

Due process bars Congress from enactments that shock the sense of fair play, which is the essence of due process. *Galvan v. Press* (1953) 347 US 522, 530; *Kinsella v. U.S.* (1959) 361 US 234, 246.

The term "claim" has many meanings just as the term "cause of action" has many meanings, *U.S. v. Memphis Cotton Oil* (1932) 288 US 62 at 68, and should be interpreted in a manner consistent with constitutional requirements of due process of law.

Where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction which would uphold it. *U.S. v. Harris* (1953) 347 US 612 at 618.

To these propositions, in the Court of Claims, the Government replied that "sovereign immunity" permitted the United States of America to discriminate as

> "the opportunity to sue the United States is not a right but a privilege"

and

> "No discrimination in a legal sense is involved in these limitations because no right to sue exists in the first place."

We respectfully submit that:

a. The right to damages for inverse condemnation is a constitutional right under the Fifth Amendment to the Constitution.

Coates v. U.S. (1950) 117 Ct. Cl. 795;

Coates v. U.S. (1953) 124 Ct. Cl. 806;

Youngblood v. L.A. County Flood Control District (1961) 56 Cal 2nd 603, 364, P2nd 840;

House v. L.A. County Flood Control District (1944) 25 Cal 2nd 384, 153 P 2nd 950 (collapse of levee).

b. A right granted by the constitution cannot be taken away or denied by the failure of the legislature to act.

Rose v. State of California (1942) 19 Cal 2nd 713, 123 P 2nd 505.

c. The constitutional provision of eminent domain is self-executing and there is no immunity from a suit based upon a constitutional right.

Rose v. State of California, supra;

Bauer v. County of Ventura (1955) 45 Cal 2nd 276, 289 P 2nd 1.

d. Therefore the doctrine of sovereign immunity, whether of substantive tort liability or "consent to sue" has no application to a suit in inverse condemnation.

e. The doctrine of sovereign immunity has been rejected by the Supreme Courts of four states in the past four years and has been indirectly questioned by three members of the Supreme Court of the United States in the case of *Barr v. Matteo* (1959) 360 US 564, and directly by two members of the Supreme Court in the case of *Malone v. Bowdoin* (1962) 8 L. Ed. (Adv) 168 at 174.

See,

Muskopf v. Corning Hospital District (1961) 56 Cal 2nd 211, 359 P 2nd 457;

Molitor v. Kaneland Community Unit District (1960) 18 Ill 2nd 11, 163 NE 2nd 89;

Hargrove v. Cocoa Beach (1959-Fla) 96 So 2nd 130;

Williams v. Detroit (Mich-1961) 111 NW2nd 1.

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4. IF THE COURT DEEMS ITSELF COMPELLED TO BAR THESE CLAIMS BECAUSE OF THE DOCTRINE OF SOVEREIGN IMMUNITY, WE RESPECTFULLY ASK A TOTAL RECONSIDERATION OF THE DOCTRINE OF SOVEREIGN IMMUNITY

We would respectfully ask a total reconsideration of the Court-made doctrine of sovereign immunity and a return of the "spirit" of *Chisholm v. Georgia* (1793) 2 US 16 where at page 68 Justice Jay, in speaking of suits against states said:

> "The extension of the judiciary power of the United States to such controversies, appears to me to be wise, because it is honest, and because it is useful. It is honest, because it provides for doing justice, without respect of persons, and

by securing individual citizens, as well as States, in their respective rights, performs the promise which every free government makes to every free citizen of equal justice and protection. It is useful, because it is honest; because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; . . . because it recognizes and strongly rests on this great moral truth, that justice is the same whether due from one man or a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican national government, which places all our citizens on an equal footing, and enables each and every one of them to obtain justice without any danger of being overborne by the weight and number of their opponents; and because it brings into action, and enforces this great and glorious principle, that *the people are the sovereigns of this country*, and consequently that fellow citizens and joint sovereigns cannot be degraded by appearing with each other in their own courts to have their controversies determined. The people have reason to prize and rejoice in such valuable privileges; and they ought not to forget, that nothing but the free course of constitutional law and government can insure the continuance and enjoyment of them." (Italics ours.)

Thus the "*Spirit of Chisholm v. Georgia*" utterly rejects the idea that the state is superior to the individual, but rather reflects equality of the individual with the state; it rejects the idea of men's rights being derived from the state but asserts that the

rights of the state come from the people; it rejects the concept that the state must give its consent to be sued; it rejects the concept of sovereign immunity in a nation of free men.

While volumes have been written as to the unfairness of the concept of sovereign immunity (and "due process" is fundamentally a question of basic fairness), we respectfully submit that the concept of sovereign immunity is fundamentally illogical as, the government, which is the agent of the sovereign people, asserts its alleged immunity from its principals (the sovereign people), and calls this "sovereign immunity"! The agent claims self-asserted immunity from its principal. This is not immunity *of the* sovereign, but immunity *from the* sovereign.

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5. WHY THE SUPREME COURT SHOULD GRANT A WRIT OF CERTIORARI IN THIS CASE

A. The application of 28 USC 1500 to these cases constitutes a gross discrimination against individuals who have a cause of action in excess of $10,000 under both the Federal Tort Claims Act and under the Fifth Amendment in the nature of inverse condemnation by denying them the right to pursue one of these causes of action.

B. The "justification" for this *admitted discrimination* is the contention of the United States, concurred in by the Court of Claims, that

> ". . . the opportunity to sue the United States is not a right but a privilege."

and

> "No discrimination in a legal sense is involved in these limitations because no right to sue exists in the first place."

C. We respectfully submit that discrimination by the government is prohibited by the "Due Process" clause of the Fifth Amendment.

D. We respectfully submit that, as inverse condemnation is a constitutional right, one may not *constitutionally* be deprived of a forum in which to litigate his constitutional right.

E. For the Supreme Court to deny this Petition for Certiorari is to approve the contentions of the Department of Justice and the Court of Claims that the government of the United States can act in a discriminatory manner and can deny a litigant a forum in which to litigate a constitutional right. We do not believe that the Supreme Court approves either proposition.

---

6. CONCLUSION

We respectfully submit that the application of 28 USC 1500 to the circumstances of these cases is unnecessary under the language of the code section, is grossly discriminatory if it is deemed applicable, is unconstitutional if deemed applicable, and if the case-law indicates that the doctrine of sovereign immunity would compel the application of 28 USC 1500, the doctrine of sovereign immunity should be reconsidered and discarded as illogical, mistaken, and unjust.

The result of this interpretation is that the Petitioners are deprived of the right to litigate their constitutional rights in inverse condemnation.

Dated, Chico, California,
August 10, 1962.

Respectfully submitted,

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The Court of Claims did not write an opinion.

JURISDICTION

The judgment below was entered on May 25, 1962. The petition for a writ of certiorari was filed on August 21, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

STATUTE INVOLVED

28 U.S.C. 1500 provides:

> The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

QUESTION PRESENTED

Whether a claim cognizable only under the Tort Claims Act and pending in another court was properly dismissed by the Court of Claims.

STATEMENT

These suits, brought in the Court of Claims under the Tucker Act, seek recovery for damage to lands and personal property of petitioners resulting from the collapse of levees on the Feather River in California in 1955 and the ensuing escape of flood waters. The levees were constructed by the United States in connection with the Sacramento River Flood Control Project. Petitioners represent 164 persons affected by the floods, and the damages claimed aggregate approximately $13,000,000.

The petitions filed in the Court of Claims further set forth (par. VI):

> Actions are pending in the United States District Court for the Northern District of Cali-

fornia, Northern Division (Sacramento, California), which are actions against the United States of America on behalf of each petitioner herein for the same damage herein and arising out of the same facts as form the basis of the within Petition, the sole difference being that the actions there pending are claims based on negligence, whereas this Petition is in inverse condemnation.[1]

ARGUMENT

1. The Court of Claims correctly dismissed the petitions. 28 U.S.C. 1500 excludes from the jurisdiction of the Court of Claims "any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States." Whether "claim" as used in 28 U.S.C. 1500 means "cause of action," as urged by petitioners (Pet. 7-9), might be a relevant question in a situation where the operative facts supported two separate theories of recovery. This is not such a case. The petitions on their faces negate any claim cognizable by the Tucker Act. Although the petitions use the phrase "inverse condemnation," the facts alleged fall far short of constituting a taking of property for public use. The sole complaint is that the United States, in the light of the entire flood control project, should have built stronger levees. But it was not the construction of the levees which damaged petitioners' property. To

[1] The suits filed under the Tort Claims Act have been dismissed but appeals have been taken and are pending in the Ninth Circuit.

constitute a taking there must be "a direction to do that which resulted in a taking" *United States* v. *Lynah*, 188 U.S. 445, 467. Long before the Tort Claims Act permitted enforcement of tort liability against the United States, the line of demarcation between tort and taking was clearly drawn by this Court under parallel factual conditions in *Sanguinetti* v. *United States*, 264 U.S. 146, this Court stating at pp. 149-150:

> * * * in order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property. * * * It was not shown that the overflow was the direct or necessary result of the structure; nor that it was within the contemplation of or reasonably to be anticipated by the Government. If the case were one against a private individual, his liability, if any, would be in tort. * * *

So, here, the flooding which allegedly damaged petitioners' property was not the direct result of the structure, nor within the contemplation of the project. In fact, just the opposite is true. The purpose of the levees was to protect the land. Certainly no servitude has been imposed upon the land by the failure of the levees to perform their intended function and, accordingly, nothing has been taken. Cf. *United States* v. *Cress*, 243 U.S. 316; *Peabody* v. *United States*, 231 U.S. 530.

That petitioners were simply re-alleging their tort claims in the Court of Claims is clear from two addi-

tional considerations. First, if there is a taking, the property interest taken vests in the United States. *United States* v. *Causby*, 328 U.S. 256. Yet, here there is no easement or other interest that would vest in the United States upon payment of judgments. Second, the amounts claimed do not purport to represent the value of such an interest. On the contrary, the complaint specifies all the normal items of tort recovery, such as loss of profits and damage to personal property, including even "clothing and personal effects." The mere characterization of "inverse condemnation" cannot change the essential nature of the case. Since it involves only a tort claim, the Court of Claims could, in no event, entertain it. See 28 U.S.C. 1346(b). And since it is in all respects the same claim as petitioners had already filed in the district court, it was property dismissed under 28 U.S.C. 1500. *British American Tobacco Co.* v. *United States*, 89 C.Cls. 438, certiorari denied, 310 U.S. 627.

2. Petitioners' remaining contentions fall with the conclusion that their claim sounds in tort: On the present facts, there is no question of discrimination between large and small claimants. There is only one claim or cause of action which is cognizable in only one court without regard to the amount in controversy. Similarly, since there is a statute waiving immunity (the Tort Claims Act) and a forum where the claims can be and are being heard, the question of sovereign immunity (Pet. 12-15) is not presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully,

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SEPTEMBER 1962.

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